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Supreme Court, U.S.
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No. ~~1691~~

IN THE

Supreme Court of the United States

October Term, 1970

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1831

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

Opinions Below

The opinion of the Supreme Court of Iowa (Pet. 8a-23a) is reported at 185 NW 2d 738. The findings and conclusions of the trial court (R. 40-46)[1] are not reported.

Jurisdiction

The judgment of the Iowa Supreme Court was entered on April 9, 1971. The petition for a writ of certiorari was filed on June 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

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[1] Record on appeal.

Question Presented

Whether the unqualified right of employees to sue under Section 16(b) of the Fair Labor Standards Act of 1938, as amended, to recover overtime compensation, liquidated damages and attorney's fees, as provided by the Act, must yield to the labor policy expressed in the Labor Management Relations Act of 1947 favoring binding arbitration of grievances under collective bargaining agreements.

Statutory Provisions

Section 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*; Sections 203(d) and 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 153, 29 U.S.C. 173(d) and 185(a); and Section 3 of the United States Arbitration Act of 1925, 43 Stat. 883, 9 U.S.C. 1 *et seq.* are set forth at pp. 24a-26a of petitioner's brief.

Other relevant statutory provisions include Sections 15(a), 16(c) and 17 of the Fair Labor Standards Act; Sections 6 and 7 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251 *et seq.*; and Section 1 of the United States Arbitration Act of 1925. These provisions are set forth *infra*, appendix, pp. A-1 - A-6.

Statement

These consolidated actions were brought in the District Court of Iowa for Crawford County under Section 16(b) of the Fair Labor Standards Act by 14 named employees seeking to recover unpaid overtime compensation, liquidated damages and attorney's fees. The employees, all maintenance men at petitioner's meat processing plant during the two-year period involved in this action, were required to be "on call" during their lunch periods for emergency maintenance work and claimed petitioner had failed to compensate them in accordance with the overtime provisions of the Fair Labor Standards Act for hours worked over 40 in one week at one and one-half times the regular rate at which they were employed. Respondents, contrary to petitioner's statement (Pet. 4) asserted no

rights under the collective bargaining contract in effect at petitioner's plant.

In its answer, petitioner asked for dismissal of the complaint since the employees were subject to a collective bargaining agreement and had failed to proceed under its grievance procedures (Pet. 2-2a). Petitioner's motion to dismiss for such failure was denied by the trial court for the reason that "the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through collective bargaining agreement entered into with the employer and the representative of the employees." (*ibid*)

The collective bargaining agreement between petitioner and the union, Associated Employees Organization, provides for a lunch period,[2] although not specifying its duration, and makes no provision for "on call" compensation (Pet. 27a). The contract also states that time and one-half will be paid for hours worked in excess of eight in any day, and in excess of 40 in any one week (*ibid*). The grievance procedure for violation of the agreement provides, inter alia, that the aggrieved employee must submit a written grievance to his immediate supervisor within 10 days of the knowledge of the incident and then, absent settlement, he must follow procedural steps upward through the management hierarchy – Plant Superintendent, Plant Manager, Vice President for Industrial Relations – to an arbitrator selected by both union and management from a panel provided by the Federal Mediation and Conciliation Service (Pet. 27a-29a). The arbitrator's authority is confined to applying the terms and conditions specifically set forth in the agreement (Pet. 29a). A time table is provided for each step, and Section 3 of the agreement states that "if the Union fails to process a grievance in the time

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[2] ARTICLE XIV - MEALS, Sectional: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift except when the shift does not exceed five and one-half (5-½) hours.

specified herein, the grievance in question is ended." (*ibid*). The time limit is extended at either party's request only for step III. (*ibid*). The agreement also contains a "no strike" clause (Defendant's Exhibit A).[3]

The trial court found under the facts that the maintenance employees performed emergency repairs during their lunch periods and were on call for such work throughout the two year period and entitled to compensation (Pet. 3a-42, 10a). It entered judgment awarding the employees basic compensation and attorney's fees. It declined to award liquidated damages (Pet. 3a-4a).

The Supreme Court of Iowa affirmed the judgment, two justices dissenting. The majority held that the legal principle regarding compensable time under the Fair Labor Standards Act for being "on call" was settled by this Court's decision in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and petitioner does not now challenge the correctness of this ruling (Pet. 4). Petitioner does challenge the majority holding that the specific Congressional intent manifest in the Fair Labor Standards Act "giving employees strong and detailed rights in court" outweighs "the general Congressional intent favoring arbitration" in the Labor Management Relations Act of 1947. The majority reasoned that the "broad Congressional policy" expressed in the Fair Labor Standards Act encompasses "more than simply wage relief for employees." It includes "broad economic considerations--improvement in commerce among the states" and "the remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of (its) broader objectives." (Pet. 14a).

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[3] ARTICLE VI - COMPANY AND UNION RESPONSIBILITIES, Section 1: During the term of this Agreement there shall be no strike, stoppage, slow-down or suspension of work on the part of the Union or its members or lock-out on the part of the Company. The Union further agrees that it will in no way interfere with the business of the Company by sanctioning or conducting a boycott on the handling of goods procured from a source or destined to a point where labor controversy may exist.

Argument

I. The decision of the majority of the Iowa Supreme Court is correct; it accords with principles well settled by decisions under the Fair Labor Standards Act of this Court and the majority of the courts of appeals. The decisions relied upon by petitioner and the dissenting justices are distinguishable both in law and fact.

While the issue as to whether employees' substantive rights under the Fair Labor Standards Act are arbitrable under agreements for binding arbitration has never been squarely presented to this Court, the decisions of this Court, since the enactment of the statute in 1938, rejecting any modification, by private or collective agreements, of these rights granted in the public interest, precludes any implication that the labor policies expressed in the Labor Management Relations Act require their determination in a private forum in accordance with the terms of the contract.

A. Contrary to petitioner's claim (Pet. 6), the employees here are not asserting rights under the collective bargaining agreement or breach of that agreement by petitioner. They are asserting rights under the Fair Labor Standards Act granted them by Congress as a means of achieving national compliance with the provisions of the statute.

The federal labor policy to be effectuated by Section 301(a) of the Labor Management Relations Act of 1947 is the promotion of industrial peace by statutory recognition of the collective agreement as a valid, binding and enforceable contract, and the agreement for arbitration of grievance disputes is "the *quid pro quo* for an agreement not to strike," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 454-455 (1957) also, *Boys Markets* v. *Clerks Union*, 398 U.S. 235 (1970). On the other hand, the federal policy under the Fair Labor Standards Act, as enunciated by this Court in *U.S.* v. *Darby Lumber Co.*, 312 U.S. 100 (1941), is "to exclude from interstate commerce goods produced for commerce under conditions detrimental to the maintenance of minimum standards of living necessary

for health and general well being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced."

To achieve this objective, Congress made it unlawful in Section 15(a) of the Act for any person to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of the minimum wage and overtime compensation provisions of the Act. (A-1). To effect compliance with the minimum wage and overtime provisions, Congress has provided a detailed enforcement scheme in Sections 16(a), 16(b), 16(c) and 17, (A-1, A-2, A-3; Pet. 26a) only a part of which confers a right on the individual employee to seek in court recovery of wages lost through violation, together with liquidated damages and attorney fees (Section 16(b)).

The private-public character of these rights under Section 16(b) was emphasized by this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1946) where it said "(a)lthough this right to sue is compensatory, it is nevertheless an enforcement provision" (id. at p. 709). In *Brooklyn Savings Bank*, the employees had waived their claims for liquidated damages in a settlement with their employer and subsequently sued in court for their payment. In holding such a suit proper, this Court stated "(w)here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate," therefore, "(p)rohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the act to all employers subject thereto, unless expressly exempted by the provisions of the Act" (id. at p. 710). There is no exemption provided for employers operating under collective bargaining agreement as petitioner suggests (Pet. 8).

The enforcement aspect of the employee's individual right to seek recovery of unpaid wages under the statute is further underscored by the Congressional amendment made to Section 16(b) in 1961[4] terminating the employee's right to sue under that section if the Secretary of Labor files a Section 17 action against the employer and seeks restraint of any further withholding of wages (Pet. 26a). The restitution of wages denied through the employer's violation, whether sought by the employee individually or by the Secretary of Labor was meant "to increase the effectiveness of the enforcement of the Act by depriving the violator of any gains accruing to him through his violation * * * and "to protect those employers who comply with the Act from having to compete unfavorably with employers who do not comply," *Wirtz* v. *Malthor, Inc.*, 391 F. 2d 1, 3 (9th Cir., 1968).

The stultifying effect upon the "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto" (*Brooklyn Savings Bank* v. *O'Neil, supra*) by remitting the employees' Sec. 16(b) rights to the bargaining table for vindication is too readily obvious for extended discussion, particularly in the light of the fact that the Department of Labor has neither the staff nor the facilities to check two million establishments employing employees covered by the Act. *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261, 1263 n.2 (5th Cir., 1970). The competitive

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[4] In restoring full equity jurisdiction to the courts in a suit brought by the Secretary under Section 17 to include restraint of withholding of unpaid wages, the Congress noted that the enforcement provisions of the Act were not operating satisfactorily to protect the public interest. As stated by the Fifth Circuit in *Wirtz* v. *Jones*, 340 F. 2d 901, 903 (1965), "(w)ith the taking of necessary action left to the initiative of the employees themselves, enforcement was obviously exposed to employer and other pressures. The implications are plain from that part of the Senate Committee report which said: 'Very few of these suits have been brought by employees under section 16(b) of the act and of the few that have been brought most are initiated by individuals no longer in the employ of the defendant employer.' U.S. Code Cong. & Ad. News, 87th Congress, First Session, 1961, Vol. 2 at 1658."

advantage to employers of forcing through arbitration their employees' statutory rights under the label of contract rights is made forcefully clear by the facts of this case. No amount of circumlocution by petitioner disguises the fact that the employees' complaint asserted rights under the Fair Labor Standards Act and not under the collective bargaining agreement (Pet. 4, 5, 6, 7, 9, 11). It matters little that the statute makes no provision for a "work-free lunch-time." (Pet. 11) The statute provides that no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess (thereof) at a rate not less than one and one-half times the regular rate at which he is employed (Section 7). Clearly if the employee works through every mealtime and still does not work over 40 hours per week, he is not entitled to time and one-half his regular rate under the statute. The employees in this instance sought compensation only for hours worked in excess of 40. The Act further provides (and the contract does not) as compensation for delay in payment of the statutory wage, an additional amount in liquidated damages (*Brooklyn Savings Bank v. O'Neil, supra*), unless the employer shows "'*to the satisfaction of the court*' that the act or omission * * * was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act; then the *court* may, in its sound discretion, award no liquidated damages" (Section 11, Portal-to-Portal Act of 1947) emphasis added. Although the trial court in this instance declined to order liquidated damages, the employees' rights to such an award can only be cut off by judicial determination, not by waiver under an employer-union agreement, *Brooklyn Savings Bank* v. *O'Neil*, supra; *D. A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946).

Furthermore, the grievance machinery under the contract between petitioner and the union is in its application inconsistent with the rights of the employees under the Fair Labor Standards Act and clearly repugnant to the Act. In the Portal-to-Portal Act of 1947[8] Congress enacted a statute of limita-

[8] In the Portal-to-Portal Act, Congress specifically legislated

tions barring actions on claims not commenced within two years after the cause of action accrued, and such actions are considered commenced on the day the complaint is filed in court (Sections 6 and 7) (App. A-4, A-5). The effects of dismissal of the instant suit, as sought by petitioner in the trial court, for failure to exhaust contract remedies, and remission to the grievance and arbitration procedure under the contract would be erosion of accrued back wages by operation of the statute while the employees' 16(b) claims slowly wended their way through the grievance machinery and arbitration. Resort to the grievance provisions in petitioner's agreement with the union (Pet. 28a-29a) graphically illustrates the number of weeks of accrued back wages which would be sacrificed to to this procedure.[6] Moreover, under the contract, the employees' claims would be completely foreclosed if the union fails to process a grievance within the time specified therein (Pet. 29a). The disruptive effect upon compliance with the Fair Labor Standards Act will not be mitigated by the availability of vacation, rehearing, modification or correction of the arbitrator's award under Sections 10 and 11 of the Arbitration Act if it is not in accordance with the provisions of the statute, as urged by petitioner citing *Evans* v. *Hudson*

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as to what is to be considered compensable time under the Fair Labor Standards Act. In making travel time and preliminary and postliminary activities noncompensable, unless such activities are made compensable by express provisions of written or nonwritten contracts or custom (§§ 4(a)(1)(2), 4(b)(1)(2), Senate Report No. 37, 80th Cong., 1st Sess., p. 45, specifically states "Any activity occurring during the scheduled workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act," and cited the example * * * "if a lunch period during the scheduled workday is compensable or not compensable under the provisions of the Fair Labor Standards Act, it will *continue to be compensable or not compensable according to that Act.*" (Emphasis added.)

[6] The Federal Mediation and Conciliation Service reports, that of the 722 cases sampled in 1970, the total time between request for a panel (of arbitrators for the parties to chose from) and the arbitration award was 164.2 days. "The FMCS and Arbitration: Problems and Prospects," April 1971 *Monthly Labor Review.*

Coal Co., 165 F. 2d 970 (3rd Cir. 1948).[7] Congress in enacting the Portal-to-Portal Act made no provision for tolling the statute upon motions for stays pending arbitration under the federal Arbitration Act, and vacation of an award as inconsistent with the Fair Labor Standards Act will not reinstate the accrued unpaid wages barred by the statute. Where, as here, the employer asks for an outright dismissal (Pet. 5) of the complaint, not for a stay pending arbitration, such a result is fore-ordained.

It is well settled under the Fair Labor Standards Act that the "results on the individual of the operations under the contract must be tested by the statute," *Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 463 (1948); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947); *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945); *Walling v. Youngerman-Reynolds Co.*, 323 U.S. 37 (1944); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 89 (1944); *Overnight Motor Transp. Co. v. Missel*, 318 U.S. 572 (1942) and a contract that has for its purpose, of which has the effect of circumventing or invading the command of the Act, is invalid and unenforceable, *Republican Pub. Co. v. American Newspaper Guild*, 172 F. 2d 934, 945 (1st Cir. 1946); *Torres v. American R. Co. of Porto Rico*, 157 F. 2d 255, 256 (1st Cir., 1946) cert. den. 329 U.S. 782; *Caserta v. Homes Lines Agency, Inc.*, 273 F. 2d 943, 946-947 (2nd Cir., 1959); *Mitchell v. Turner*, 286 F. 2d 104, 106 (5th

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[7] In *Evans v. Hudson Coal Co.* suit was brought before the enactment of the Portal-to-Portal Act by 19 workmen seeking to recover wages for both regular and overtime hours of work within the periods from October 24, 1938 to April 30, 1946. The state statute of limitations applicable to Fair Labor Standards claims before the passage of the Portal Act was six years in Pennsylvania. (House Report No. 71, p. 50, Senate Report No. 37, p. 49, 80th Cong., 1st Sess.). It is questionable that the Third Circuit would have similarly decided after the passage of the Portal Act. In any event *Evans v. Hudson Coal Co.*, and the Third Circuit's decisions in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943) and 160 F. 2d 661 (1947) and *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (1945) relied upon by the petitioner and dissenters are otherwise distinguishable and inapposite as discussed *infra*.

Cir., 1960); *Wood* v. *Meier*, 218 F. 2d 419, 420 (5th Cir., 1955); *Burry* v. *National Trailer Convoy, Inc.*, 338 F. 2d 442, 426 (6th Cir., 1964); *Fleming* v. *Warshawsky*, 123 F. 2d 622, 626 (7th Cir., 1941); *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112, 116 (S.D. Iowa, 1945), aff'd *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (8th Cir., 1945), aff'd *per curiam* 327 U.S. 757 (1946); *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. 2d 115, 118 (8th Cir., 1942); *Robertson* v. *Alaska Juneau Gold Mining Co.*, 157 F. 2d 876, 879 (9th Cir., 1946), cert. den. 331 U.S. 823; *Handler* v. *Thrasher*, 191 F. 2d 120, 123 (10th Cir., 1951).

Under these principles there is little room for petitioner's argument that the various benefits derived by the employees from the collective bargaining agreement laid upon them a corresponding duty to submit their statutory rights under the Fair Labor Standards Act to binding arbitration under the terms provided by contract (Pet. 11) rather than to the court. Petitioner's repeated characterization of these statutory rights as contract rights in order to take shelter under this Court's decisions construing Section 301(a) of the Labor Management Relations Act, particularly *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, where concededly a contract right -- the right to severance pay -- was involved, only emphasizes petitioner's awareness that federal rights under another statute do not derive from collective bargaining and cannot be waived in private settlement of disputes.

The principles expressed in *Maddox*, applied to the facts in this case, illustrate the disruptive consequences which would flow from elevating the goal of industrial peace through the arbitral process over the goal of uniform compliance by employers with the Fair Labor Standards Act. Undeniably "conscientious handling of grievance claims (enhances) the union's prestige with employees" (*Maddox*, p. 653), yet the union in this case is powerless to press the employees' greater statutory rights under the terms of the contract any more than an arbitrator is authorized to award statutory remedies. (Pet. 29a) Undeniably "employer interests * * * are served by limiting the choice of remedies available to aggrieved em-

ployees," since the remedies under the contract are appreciably more advantageous monetarily to the employer than those under the statute, particularly as this Court in *Maddox* noted that "in the normal situation, * * * contract grievance procedures are (not) inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," (at p. 653). The erosion of accrued back wages through the operation of the statute of limitations while the employees are futilely implementing the procedures effectuates neither the goal of industrial peace nor the legislative goals of the Fair Labor Standards Act.

The principles of this Court's decisions in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971) and *Wilko v. Swan*, 346 U.S. 427 (1953), apply *a fortiori* in this case. In both decisions, this Court carefully analyzed the impact which remission to arbitration would have upon the scope of substantive federal right to be protected, and emphasizing the limitations on the authority of an arbitrator to the express terms of the contract, (*Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597; compare Section 2: Arbitration Provision, under the contract in the instant case) the limited scope of judicial review of the arbitrator's determination, and decided against diminution of the right – in *Arguelles*, the seaman's right to prompt payment of wages, and in *Swan* the rights of securities investors against fraud – by compulsory submission of disputes involving these rights to arbitration. The rights of employees and complying employers under the Fair Labor Standards Act stand in no lesser need for the same protection.

B. Decisions of two courts of appeals favoring compulsory arbitration of wage claims under the Fair Labor Standards Act are distinguishable or no longer valid.

The Third Circuit's decisions in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943) and 160 F. 2d 661 (1947), *Watkins v. Hudson Coal Co.*,* 151 F. 2d 311 (1945), cert. den.

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*In *Watkins*, the Third Circuit was careful to point out that after the rights of the claimants have been determined as a matter of law

327 U.S. 777 (1946); and *Evans v. Hudson Coal Co.*, 165 F. 2d 970 (1948), relied upon by petitioner, the dissenting justices of the Iowa Supreme Court, and the dissenting justices in *Arguelles* as favoring arbitration of wage claims under the Fair Labor Standards Act, were premised on that court's interpretation of the United States Arbitration Act of 1925, providing for stays pending arbitration under agreements for arbitration of disputes arising out of contracts involving maritime transactions or commerce, but excluding contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce (App. A-6). It was the Third Circuit's view, as explained in its later decision in *Tenney Engineering v. United Electrial R. & M. Workers*, 207 F. 2d 450 (1953), that under the Arbitration Act, employees engaged in the manufacture of goods for commerce are not to be regarded as a "class of workers engaged in foreign or interstate commerce," within the exclusionary clause of Section 1 of the Arbitration Act, since, according to its interpretation of the legislative history of that Act, only transportation workers in the channels of commerce, such as seamen and railroad workers, were excluded from its provisions, and this was consistent with its earlier decisions in *Donahue v. Susquehanna Collieries, Inc.*, *Watkins v. Hudson Coal Co.*, and *Evans v. Hudson Coal Co.*, "in all of which the employees involved were engaged in the production of coal for later sale in interstate commerce" (at p. 453). Under the Third Circuit's rationale, seaman Arguelles' claim in *U.S. Bulk Carriers* would have been automatically excluded from the compulsory arbitration provisions of the United States Arbitration Act, so the coal cases offer small support to the dissenting opinion in *Arguelles* citing these decisions as favor-

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by the court, the problems of calculating how much each claimant is entitled to is properly referable either to a special master or an arbitrator. "We do not refer to arbitration the question of legality of the (wage) formula" the court stated, * * * "the right of time and one-half for overtime, plus liquidated damages for failing to get it, is an individual right of the employee, not a criminal sanction, nor even a general right given to an employee's bargaining unit." (at p. 315, 320).

ing arbitration of the seaman's wage claim, particularly since the Third Circuit stood alone in its view of the exclusionary clause of Section 1 of the Arbitration Act.[9]

The vitality of the Third Circuit's decisions in the coal cases as precedent should be measured against the subsequent enactment of the Portal-to-Portal Act and successive amendments to the Fair Labor Standards Act which specifically define areas where collective agreements may vary the express provisions of the Act. In the Portal-to-Portal legislation, the Congress left to agreement or custom the matter of compensable travel time and preliminary and postliminary activities, but decreed that "activities during the scheduled workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act," (supra p. 7, Fn 5). To this extent, the Ninth Circuit's decision in *Beckley* v. *Teyssier*, 332 F. 2d 495 (1964) can be reconciled with Congressional intent that compensation for travel time, to and from San Clemente Island where they were employed by the carpenters involved in that case, is a contractual right governing compensation for such activities, since such travel time was specifically made non-compensable by the Portal-to-Portal Act.

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[9]Contrary to the Third Circuit's view of the effect of the exclusionary clause in the federal Arbitration Act, the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876 (1944), a Fair Labor Standards case; the Fourth Circuit in *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33 (1948); *United Electrial R. & M. Workers* v. *Miller Metal Products*, 215 F. 2d 221 (1954); the Fifth Circuit in *Lincoln Mills of Ala.* v. *Textile Workers Union*, 230 F. 2d 81 (1956); the Seventh Circuit in *United Steelworkers* v. *Galland-Henning Mfg. Co.*, 241 F. 2d 323 (1957); and the Tenth Circuit in *Mercury Oil Refining Co.* v. *Oil Workers Int. Union, CIO*, 187 F. 2d 980 (1950) were of the opinion that the exclusionary clause in Section 1 included all contracts of employment in commerce and production of goods for commerce. This Court in reversing the Fifth Circuit's decision in *Lincoln Mills* that the district court had no jurisdiction under Section 301(a) of the LMRA to order compliance with grievance arbitration provisions, did not allude to the Fifth Circuit's discussion of the federal Arbitration Act at all, and Justice Frankfurter's dissenting opinion finds rejection, "though

Section 7 of the Fair Labor Standards Act makes mandatory the payment of overtime compensation by its very terms – "*Except as otherwise provided* in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce for in the production of goods for commerce, or is employed in an enterprise engaged in commerce or the production of goods for commerce, for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Exceptions to this command are explicitly spelled out in the Act, and where collective bargaining agreements – which observe and minimum wage and overtime provisions of the Act – relieve the employer of violations of Section 7, those provisions are specifically spelled out, i.e. §§ 7(b)(1)(2); 7(e) (7) and 7(f). Absence of specific prohibitions against arbitration of Fair Labor Standards claims does not, as viewed by the dissenting justices of the Iowa Supreme Court, leave to the parties to agree "between themselves how these rights shall be enforced." (Pet. 17a). Where Congress meant collective bargaining agreements to vary the mandatory provisions of the Act, it knew how to say so. If it intended to leave enforcement of the Act's provisions to the employer, union and arbitrators these carefully drawn references to collective agreements would have been superfluous. Wholesale exemption from compliance with the Fair Labor Standards Act of employers operating under collective bargaining agreements with binding arbitration clauses was clearly not within the intendment of Congress.

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not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion." *Textile Workers* v. *Lincoln Mills*, 353 U.S. at p. 466.

CONCLUSION

The decisions of the District Court of Iowa for Crawford County and the majority of Iowa Supreme Court are correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

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(APPENDIX)

Fair Labor Standards Act

FAIR LABOR STANDARDS ACT OF 1948, AS AMENDED, 52 Stat. 1060, as amended, 29 U.S.C 201, et seq.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor[81] issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;[82]

SEC. 16. (c) The Secretary of Labor[83] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and

an additional equal amount as liquidated damages. When a written request is filed by any employee with the secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the *statutes*[90] of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.[91]

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).[93]

Relation to Other Laws

Portal-to-Portal Act

PORTAL-TO-PORTAL ACT OF 1947, 61 Stat. 84, 29 U.S.C. 251, et seq.

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*[1]

* * * * * * *

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

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United States Arbitration Act

United States Arbitration Act of 1925 (43 Stat. 883, 9 U.S.C. § 1 *et seq.*)

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670)